Supreme Court, U.S.
FILED
JUN 21 2001
JUN 21 2001
CLERK

No. 00-507

IN THE

Supreme Court of the United States

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* TOWNS OF LEDYARD, NORTH STONINGTON, AND PRESTON, CONNECTICUT SUGGESTING AFFIRMANCE

BENJAMIN S. SHARP
Counsel of Record
GUY R. MARTIN
DONALD C. BAUR
KELLY A. CAMERON
PERKINS COIE LLP
607 Fourteenth Street, N.W.
Suite 800
Washington, D.C. 20005-2011
(202)-628-6600

Counsel for the Towns of Ledyard, North Stonington, and Preston, Connecticut

DONALD C. MITCHELL
1335 F Street
Anchorage, AK 99501
(907)-276-1681

June 21, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

29 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. OVER TIME, THE INDIAN CANON HAS BEEN APPLIED TO CIRCUMSTANCES THAT ARE INCONSISTENT WITH ITS THE ORIGIN	5
A. Introduction	5
B. Original Purpose of the Canon	7
C. In the Twentieth Century, the Court has Applied the Indian Canon in Factual Circumstances that are Inconsistent with Its Original Purpose	10
II. THE HISTORY OF THE INDIAN GAMING REGULATORY ACT DEMONSTRATES THAT IT IS INAPPROPRIATE TO INVOKE THE INDIAN CANON TO DISCERN THE INTENT OF CONGRESS IN THAT STATUTE	15
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page
Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918)	10, 11, 13, 15
Bath Iron Works Corp. v. Office of Workers' Compensation Programs, 506 U.S. 153, 166 (1993)	19
Cherokee Nation v. Georgia, 30 U.S. 1 (1831)	14
Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)	5
Choate v. Trapp, 224 U.S. 665, 675 (1912)	10, 11
Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970)	7
Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970)	9
Circuit City Stores, Inc. v. Adams, __ U.S. __, 121 S. Ct. 1302, 1311-1312 (2001)	16, 17
Connecticut v. U. S. Department of the Interior, 228 F.3d 82 (2d Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1732 (2001)	3
Connecticut National Bank v. Germain, 503 U.S. 249, 254 (1992)	5, 22
County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985)	12, 15
DeCoteau v. District County Court for Tenth Judicial District, 420 U.S. 425, 447 (1975)	10, 12
F.D.A. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)	5
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982)	5
Jones v. Meehan, 175 U.S. 1 (1899)	7, 8, 9
The Kansas Indians, 72 U.S. 737, 760 (1866)	8
McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973)	11, 12
Mayer v. Isaac, 6 Meeson & Welsby 605, 612, 151 English Reports 554, 557 (1840)	8

TABLE OF AUTHORITIES—Continued

	Page
Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 194 n. 5. (1999)	9
Nevada v. United States, 463 U.S. 110, 142 (1983)	14
Noonan v. Bradley, 76 U.S. 394, 407 (1869)	8
Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985)	12, 13
Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461-62 (10th Cir. 1997)	12
Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982)	11
Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)	5
Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 461 U.S. 929 (1983)	17
South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998)	6
United States v. Atlantic Richfield Co., 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980)	13
United States v. Mitchell, 445 U.S. 535, 542-46 (1980)	14
Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965)	12
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	11, 12
Winters v. United States, 207 U.S. 567, 576 (1908)	9
Worcester v. Georgia, 31 U.S. 515 (1832)	8, 9, 11, 12, 20

TABLE OF AUTHORITIES—Continued

Statutes	Page
4 Stat 411	6
12 Stat. 765, 767	6
16 Stat. 544, 566	9
24 Stat. 388	7
26 Stat. 1101	10
68 Stat. 250	7
25 U.S.C. § 177	6
25 U.S.C. §§ 461, *et seq.*	6
25 U.S.C. §§ 1751-1760	2
25 U.S.C. §§ 3001, *et seq.*	6
Other Authorities	
H.R. Rep. No. 99-488 (1986)	18
S. Rep. No. 100-446 (1988)	18, 19, 20
S. Rep. No. 99-493 (1986)	18
H.R. 8193, 50th Cong. (1888)	10
129 Cong. Rec. 34184-85 (1983)	17
132 Cong. Rec. 8179-88 (1986)	18
134 Cong. Rec. 24016-37, 25781 (1988)	19
Indian Gaming Control Act: Hearing on H.R. 4566 Before the House Committee on Interior and Insular Affairs, 98th Cong. (1984)	17
Indian Gambling Control Act: Hearings on H.R. 1920 and H.R. 2404 Before the House Committee on Interior and Insular Affairs, 99th Cong. (1985).	17
Implementation and Enforcement of the Indian Gaming Regulatory Act, Public Law 100-497: Oversight Hearings on Implementation and Enforcement of the Indian Gaming Regulatory Act, Public Law 100-497 Before the House Comm. on Interior and Insular Affairs, 102d Cong. (1992)	21

TABLE OF AUTHORITIES—Continued

	Page
Implementation of Indian Gaming Regulatory Act: Oversight Hearing on Status of the Activities Undertaken to Implement the Gaming Regulatory Act Before the Senate Select Comm. on Indian Affairs, Part I, II and III, 102d Cong. (1992)	21
Implementation of IGRA: Oversight Hearing before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources, 103d Cong. 12, 33 (1993)	20
Implementation of Indian Gaming Regulatory Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources, Parts I through IV, 103d Cong. (1993)	21
Implementation of Indian Gaming Regulatory Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources, Parts V and VI, 103d Cong. (1993 and 1994)	21
Indian Gaming Regulatory Act Amendments: Hearing on S. 2230 Before the Senate Comm. on Indian Affairs, Parts I and II, 103d Cong. (1994)	21
Indian Gaming Regulatory Act: Hearing Before the Senate Comm. on Indian Affairs, Part II, 103d Cong. (1994)	21
Gaming Regulatory Act Amendments of 1995: Hearing on S. 487 Before the Senate Comm. on Indian Affairs, 104th Cong. (1995)	21
Indian Gaming Regulatory Act Amendments of 1997: Hearing on S. 1077 Before Senate Committee on Indian Affairs, 105th Cong. (1997)	20

TABLE OF AUTHORITIES—Continued

	Page
Indian Gaming Regulatory Improvement Act of 1998: Hearing on S. 1870 Before the Senate Committee on Indian Affairs, 105th Cong. (1998)	20
Indian Gaming Regulatory Improvement Act of 1999: Hearing on S. 399 Before the Senate Committee on Indian Affairs, 106th Cong. (1999)	20
2 *Blackstone's Commentaries*, 380 (1809)	8
J. Benedict, *Without Reservation: the Making of America's Most Powerful Indian Tribe and Foxwoods, the World's Largest Casino* (2000)	2
K. Eisler, *Revenge of the Pequots, How a Small Native American Tribe Created the World's Most Profitable Casino* (2001)	2

IN THE

Supreme Court of the United States

No. 00-507

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* TOWNS OF LEDYARD, NORTH STONINGTON, AND PRESTON, CONNECTICUT SUGGESTING AFFIRMANCE

Pursuant to Rule 37 of this Court, *amici curiae* Towns of Ledyard, North Stonington, and Preston, Connecticut ("Towns") submit their brief suggesting affirmance in this case. The parties have consented to the filing of this brief.

Pursuant to Supreme Court Rule 37.4, no motion for leave to file this *amicus curiae* brief is necessary where the brief is submitted on behalf of entities such as the Towns in this case.

INTEREST OF *AMICI CURIAE*

Ledyard, North Stonington, and Preston are small towns in eastern Connecticut. The Towns are well situated to address the effects of implementation of the Indian Gaming

Regulatory Act ("IGRA") and other laws regarding federal Indian law and policy as they are at the center of the burgeoning growth of gambling on tribal lands, growth that has had profound impacts on their communities.

In 1976 a group asserting that it comprised the descendants of the Pequot Tribe of Indians filed a lawsuit in the Connecticut alleging that land within Ledyard had been transferred out of tribal ownership unlawfully during the nineteenth century. To implement Settlement of the lawsuit in 1983, Congress enacted the Connecticut Indian Land Claims Settlement Act ("Settlement Act"). 25 U.S.C. §§ 1751-1760.

The Settlement Act among other things extended federal recognition to the Mashantucket Pequot Tribe and directed the Secretary of the Interior to take into trust certain land in Ledyard as a reservation for the Tribe. In 1992, four years after the enactment of IGRA, the Mashantucket Pequot Tribe opened a casino on the reservation. Today, Foxwoods, the tribe's casino, is reported to be the largest gambling casino in the world and generating annual revenues in excess of $1 billion. *See* J. Benedict, *Without Reservation: the Making of America's Most Powerful Indian Tribe and Foxwoods, the World's Largest Casino* (2000); K. Eisler, *Revenge of the Pequots, How a Small Native American Tribe Created the World's Most Profitable Casino* (2001).

Foxwoods has a number of adverse impacts on the Towns. Because the casino is on reservation land, it is exempt from all local and state environmental, land use, public health and safety, and zoning regulation. As a result, a very large casino was built without regard to local planning and other restrictions, transforming the formerly bucolic New England communities into an around-the-clock gaming mecca. In addition, the Towns gain no tax revenues from this resort. Thus, they are forced to absorb substantial demands on their services, such as traffic control, police, emergency services,

social services, and others, without the assistance of the revenues that would normally be derived from such development.

To compound these problems, Foxwoods was quickly followed by another IGRA casino, the Mohegan Sun, only a few miles away. Two other Indian groups, the Eastern Pequots and Paucatuck Eastern Pequots of North Stonington, are currently seeking federal recognition as tribes with the expectation that they will open their own IGRA casinos. Both groups' recognition efforts are financed by non-Indian gaming developers. An additional five Indian groups claiming Pequot descent and land bases in or near the Towns are standing in line to gain federal recognition.

To expand its operations at Foxwoods, in 1993 the Mashantucket Pequot Tribe requested the Secretary of the Interior to take into trust 265 additional acres of land within Ledyard, North Stonington, and Preston. The Secretary agreed to do so. The Towns and the State of Connecticut eventually filed suit that has, since 1995, enjoined the Secretary's decision to take the land into trust.

In *Connecticut v. U. S. Department of the Interior*, 228 F.3d 82 (2d Cir. 2000), *cert. denied*, __U.S.__, 121 S. Ct. 1732 (2001), the Second Circuit held that Congress did not intend the Settlement Act to limit the Secretary's authority to take additional land into trust. In part, the court reached that result by applying the Indian canon of construction to determine that ambiguities in the text of the Settlement Act be resolved in favor of the Mashantucket Pequot Tribe. *Id.* at 92. The case has been remanded to the district court for consideration of other issues, including questions arising under IGRA. In its initial defense of the Secretary's 1995 decision, the Department of Justice argued that the Indian canon should be applied to reach a result favorable to the Tribe.

Because their lawsuit against the Secretary remains ongoing, Ledyard, North Stonington, and Preston have a direct and immediate interest in the Court's determination of the extent to which federal courts should resort to the Indian canon to resolve ambiguities in the texts of statutes that affect Native American interests. *Amici* take no position on the substantive taxation issue in the case.

SUMMARY OF ARGUMENT

Amici urge the Court to clarify the proper application of the Indian canon of statutory construction by limiting its use to factual circumstances similar to those of its judicial origin. The Indian canon was first articulated by this Court in the first half of the Nineteenth Century to construe Indian treaties that for the most part took land from Indians and that resulted from unequal bargaining power between the United States and impoverished, uneducated and unrepresented Indian tribes. Similar to the canon of construction that courts interpret ambiguous contracts against the drafter, the Indian canon was historically a logical means for construing the intent of treaties or agreements negotiated by Indians in a fashion that favored the disadvantaged party.

Over the years, application of the Indian canon migrated, often to determine the outcome of disputes, to a means of discerning the intent of Congress in enacting legislation. Perhaps this migration makes some sense where Indians with some cognizable disadvantage or inequality of bargaining power were directly involved in the legislative process. However, for most modern legislation, particularly statutes like IGRA that were developed with active participation by well-represented tribes with a primary function of regulating Indian conduct, application of the canon to favor an Indian position is not supportable by logic or any line of reasoning related to the interpretation of an agreement to favor the party with lesser bargaining power.

The history of IGRA demonstrates that Congress strove to balance a number of competing interests in drafting the legislation. It solicited and weighed a range of Indian views that appear to have been ably and comprehensively presented. Under all the circumstances that existed at the time IGRA was enacted in 1988, there is no factual basis for applying a presumption in favor of Indians in judicial construction of a statute regulating Indian gambling. *Amici* respectfully submit that the Indian canon of construction should not be applied in this case.

ARGUMENT

I. OVER TIME, THE INDIAN CANON HAS BEEN APPLIED TO CIRCUMSTANCES THAT ARE INCONSISTENT WITH ITS THE ORIGIN.

A. Introduction

The object of statutory construction is to interpret the statutory text "to give effect to the will of Congress." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). The "first step" in that process is to determine whether a statutory text "has a plain and unambiguous meaning." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If the meaning is plain and unambiguous, "that is the end of the matter," *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), and "the judicial inquiry is complete." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992).

When the meaning of a statute is ambiguous this Court has employed various tools of construction. In some instances, it is presumed that Congress intended to delegate to the agency responsible for administering a statute the authority to clarify the ambiguity. *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). If the agency's interpretation is reasonable, the Court must defer to the interpretation. *Chevron*, 467 U.S. at 843-844. Resort to the Indian canon of

construction is another means of resolving ambiguity and in this case it conflicts with the *Chevron* doctrine.

This case provides an opportunity for the Court to re-examine the original purpose of the Indian canon. In so doing, the Court can decide the extent to which it is appropriate to invoke the canon to presume the intent of Congress embodied in statutes. That re-examination will reveal that during the twentieth century the use of the canon has been expanded to apply to situations that bear no factual similarity to the circumstances that caused the Court to create the canon. It also will reveal that applying the canon to presume the intent of Congress in modern legislation no longer fairly or accurately achieves the canon's intended result.

The Indian Commerce Clause of the United States Constitution grants Congress plenary authority to decide the policies of the United States government in dealing with Native American peoples. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Over the past 212 years, Congress has exercised its Indian Commerce Clause authority by enacting hundreds of statutes.

Many of those statutes advantage Native Americans. *See, e.g.*, Nontercourse provision of 1790 Trade and Intercourse Act, 25 U.S.C. § 177 (prohibiting unauthorized sale by Native Americans of land subject to aboriginal title); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, *et seq.* (*inter alia* establishing loan fund to "promot[e] the economic development of . . . tribes and their members"); Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001, *et seq.* (mandating the return of Native American artifacts and human remains to tribes). Other statutes disadvantage Native Americans. *See, e.g.*, Indian Removal Act of 1830, ch. 148, 4 Stat 411 (authorizing the President to relocate Native Americans to land west of the Mississippi River); Act of March 3, 1863, 12 Stat. 765, 767 (withdrawing jurisdiction from Court of Claims to adjudicate

claims "growing out of or dependent on any treaty stipulation entered into with . . . the Indian tribes"); Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973) (terminating Menominee Tribe of Wisconsin). And still others both advantage and disadvantage Native Americans. *See, e.g.*, General Allotment Act of 1887, ch. 119, 24 Stat. 388 (authorizing the President to allot reservation land over tribal objection and then to sell "surplus" land, while granting citizenship to Native Americans who lived "separate and apart from any tribe" and had "adopted the habits of civilized life").

Because in some statutes Congress seeks to favor Indians and in others it does not, it makes little sense mechanically to apply an interpretive presumption in favor of Indians ostensibly to discern congressional intent.

B. Original Purpose of the Canon

For the first one-hundred years of this nation's existence, Congress often exercised its Indian Commerce Clause authority to clear the public domain of Native Americans. Between 1778 and 1871, treaties were the means Congress employed to accomplish that objective. United States commissioners negotiated with the leaders of Indian tribes in an effort to persuade the leaders to cede their tribe's aboriginal title to the land its members used and occupied. When an agreement was reached, the commissioners wrote the terms into a document denoted a "treaty." Treaties were ratified by the Senate.

As noted in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970), "[t]he Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent." Describing the reality of that process, in *Jones v. Meehan*, 175 U.S. 1 (1899), the Court acknowledged that,

> the negotiations for [every] treaty [were] conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States.

Jones, 175 U.S. at 11.

In 1832 the Court in *Worcester v. Georgia*, 31 U.S. 515 (1832), decided the meaning of an ambiguous portion of the text of the Treaty of Hopewell. Given the disparity between the negotiating positions of the U. S. commissioners and the Indian negotiators, the Court admonished that "[t]he language used in treaties with the Indians should never be construed to their prejudice." To avoid doing "injustice to the understanding of the parties," how "the words of the treaty were understood by this unlettered people rather than their critical meaning, should form the rule of construction." 31 U.S. at 582. This was not a new legal concept. The Court in *Worcester* simply extended to agreements that U.S. commissioners negotiated with representatives of Indian tribes the common law rule that ambiguous texts of contracts be construed against the party who drafted the disputed language. *See, e.g.*, 2 *Blackstone's Commentaries*, 380 (1809); *Noonan v. Bradley*, 76 U.S. 394, 407 (1870) (citing as authority for the rule, *Mayer v. Isaac*, 6 Meeson & Welsby 605, 612, 151 English Reports 554, 557 (1840)).

Thirty-four years later when a dispute arose over the meaning of the phrase "levy, sale, execution, and forfeiture"

in an 1854 treaty that had been negotiated with the Miami Indians, the Court reaffirmed the treaty-interpretation rule announced in *Worcester*. *The Kansas Indians*, 72 U.S. 737, 760 (1867). In 1899 in *Jones v. Meehan*, the Court, again citing *Worcester*, reaffirmed that an Indian treaty must "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." 175 U.S. at 11.

Disputes about the meaning of ambiguous texts of Indian treaties that were negotiated in the nineteenth century continue to the present day. When those disputes have reached the Court, it has continued to employ the rule of *Worcester v. Georgia*. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) (noting that the Court "has often held that treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indian's favor"); *accord, Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n. 5. (1999).

After the Civil War, the House of Representatives objected to the further use of treaties to implement Indian policy. In 1871, the Senate agreed that no new treaties would be negotiated. 16 Stat. 544, 566 (1871). As a consequence, United States commissioners continued to negotiate arrangements with representatives of Indian tribes for the cession of the tribes' aboriginal lands. But rather than "treaties," the arrangements were called "agreements." And rather than obtaining ratification by the Senate, the agreements were approved by both Houses through the enactment of statutes.

In all other respects, Indian agreements after 1871 were the same as earlier Indian treaties. The disparity of negotiating positions between United States commissioners and Indian negotiators was the same, and Indian representatives continued to lack formal education, English language proficiency and legal training. For these reasons, when

disputes about the meaning of ambiguous texts of agreements reached the Court, it continued to apply the rule established in *Worcester v. Georgia*. *See Winters v. United States*, 207 U.S. 564, 576 (1908) (holding that "[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians"); *accord, Choate v. Trapp*, 224 U.S. 665, 675 (1912); *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 447 (1975).

C. In the Twentieth Century, the Court has Applied the Indian Canon in Factual Circumstances that are Inconsistent with Its Original Purpose.

In 1887, William Duncan, an Anglican missionary, settled with 800 Canadian Tsimshean Indians on Annette Island in southeast Alaska. At Duncan's urging, in 1888 Representative Byron Cutcheon introduced a bill whose enactment would withdraw Annette Island for the use of Duncan "and those native people who have recently emigrated with him from British Columbia." H.R. 8193, 50th Cong. (1888). In 1891, Congress enacted section 15 of Chapter 561, 26 Stat. 1101. In language nearly identical to the language of the Cutcheon bill, section 15 withdrew "the body of lands known as Annette Islands."

In 1916, a California corporation erected a fish trap in waters offshore Annette Island, and the United States filed suit to have it removed. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court determined that Congress had enacted section 15 to enable the Tsimshean Indians to "become self-sustaining" and that, since the Indians were fishermen, their exclusive use of the waters surrounding Annette Island was essential to the achievement of Congress's objective. On that basis, the Court concluded that Congress intended the phrase "the body of lands known as Annette Islands" to include the surrounding waters.

But in so holding, the Court noted that its "conclusion has support in the general rule that *statutes* passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." 248 U.S. at 89 (emphasis added). In support of that contention, the Court cited *Choate v. Trapp*. But in *Choate*, the Court had applied the rule of *Worcester v. Georgia* for construing an *agreement* that had been negotiated with an Indian tribe, and which then had been approved by Congress by the enactment of a statute.

Applying the *Worcester* rule to construe the intent of Indian negotiators embodied in agreements they did not write made sense, regardless of the means by which Congress chose to approve the arrangement. *Alaska Pacific Fisheries* provides no guidance on why that concept might be extended to discern the intent of Congress in enacting an 1891 statute regarding the meaning of the phrase "the body of lands known as Annette Islands." Yet, since *Alaska Pacific Fisheries*, the Court has on occasion invoked the *Worcester v. Georgia* rule to presume the intent of Congress in twentieth century statutes that do not codify any agreement negotiated by disadvantaged Indians.

In *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), the Court held that Congress intended its enactment of the Indian Financing Act in 1974 and of the Indian Self-Determination and Education Assistance Act in 1975 implicitly to preempt the authority of states to impose a gross receipts tax on non-Indian contractors who construct Indian schools. In so holding, the court noted that it had "consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'" 458 U.S. at 846 (citation omitted and emphasis added). As authority for that

proposition the Court cited *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), and *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965).

But in *Warren Trading Post* the Court made no mention of *Worcester v. Georgia*. In *McClanahan* the Court employed the rule to construe an 1868 treaty. And in *White Mountain Apache Tribe* the Court noted that "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence," 448 U.S. at 143-44 (citing *McClanahan*), which employed the canon to interpret a treaty, rather than a statute.

Relying on decisions of this Court that, upon analysis, do not support the principle for which they have been cited, in recent years circuit courts have invoked the Indian canon of construction to presume the intent of Congress in all sorts of legislation. For example, in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997), the Tenth Circuit employed the rule to interpret the intent of Congress in amendments to the Indian Self-Determination and Education Assistance Act enacted in 1988. To justify doing so, the court asserted that "[t]his canon of statutory construction is 'rooted in the unique trust relationship between the United States and the Indians.'" 112 F.3d at 1462 (citation omitted). But as authority for that proposition, the court cited *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), another case in which this Court interpreted the intent of the negotiators embodied in a treaty, rather than the intent of Congress in a statute.

In *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 447 (1975), the Court noted that even in situations in which courts are required to interpret the intent of agreements that were negotiated with Indian tribes in the nineteenth century, the invocation of the Indian canon of

construction "is not a license to disregard clear expressions of . . . congressional intent." And more recently in *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), the Court accepted the proposition that the Indian canon should be used to interpret an 1864 treaty and a 1901 agreement. *Id.* at 766. But the Court then used traditional means of statutory construction to construe both documents.

Significantly, with respect to the 1901 agreement, the Court noted that "[t]he Tribe was represented by counsel, the tribal negotiating committee members spoke and understood English, and the Tribe secured a number of alterations to the United States' original proposals." 473 U.S. at 772. The Court also noted that, in addition to fulfilling obligations that the 1864 treaty imposed, Congress's enactment of the statute that approved the 1901 agreement "was motivated by additional goals," one of which was ensuring that non-Indians were treated fairly. *Id.* at 771-72.

A similar well-reasoned principle was applied in *United States v. Atlantic Richfield Co.*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980). In that case construing the Alaska Native Claims Settlement Act, the Ninth Circuit ruled that the Indian canon should, at the very least, be diminished for a contemporary statute in which the Native American interests were well represented:

> The rule of construction of ambiguous statutes in favor of Indians is based on a concern that the powerful not take advantage of the helpless and uneducated. A similar concern guides modern law on the construction of contracts of adhesion. Where, as here, the Inupiats were represented before Congress by such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsey Clark, we think the rule of construction operates with less force.

612 F.2d at 1139.

Since *Alaska Pacific Fisheries*, a rule articulated at the beginning of the nineteenth century to shield Indian negotiators from unfair disadvantage has been transformed into a sword that frequently is invoked to override or misconstrue the intent of Congress. The lower courts have followed an inconsistent and ill-defined path, through which the original intent of the canon has been obfuscated and lost. The intent of Congress in statutes, like IGRA, that affect Native American interests, may also have been to advance non-Native American-related policy objectives and developed through a legislative process in which Indian interests were amply represented and defended. In such circumstances, the canon should find no application.

The petitioners also claim that the canon derives from the unique trust relationship between tribes and the United States. This assertion likewise does not withstand scrutiny. In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Court observed that Indians who resided east of the western boundary of the United States were, in the Court's words,

> in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.

30 U.S. at 17.

Over the succeeding 170 years, *Cherokee Nation* has been cited as authority for the proposition that the United States has a trust responsibility to protect the interests of Native Americans. *See, e.g., Nevada v. United States*, 463 U.S. 110, 142 (1983) (theorizing that "[t]he United States undoubtedly owes a strong fiduciary duty to its Indian wards"). But the application of the trust responsibility doctrine has been fraught with inconsistency and confusion. It is clear that Congress has no general duty to enact statutes that benefit Native Americans. *See, e.g., United States v. Mitchell*, 445

U.S. 535, 542-46 (1980) (holding that the scope of the trust responsibility is to be decided by Congress and Congress did not intend the General Allotment Act to impose a duty on the Secretary of the Interior to manage natural resources on Indian allotments). Nevertheless, in this appeal petitioners assert that in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), the Court decided that the trust responsibility requires the judiciary to presume that Congress intends ambiguities in statutes such as the IGRA to be resolved at all times and for all purposes in favor of Native Americans; no matter the countervailing policy considerations. However, *County of Oneida* cannot bear that weight. A careful reading of the decision indicates that the cases cited in *Oneida* are authority for the less controversial propositions that ambiguities in the texts of Indian treaties are to be resolved against the United States negotiators, and that statutes claimed to abrogate treaties or extinguish aboriginal title demonstrate the clear intent to effectuate those results.

II. THE HISTORY OF THE INDIAN GAMING REGULATORY ACT DEMONSTRATES THAT IT IS INAPPROPRIATE TO INVOKE THE INDIAN CANON TO DISCERN THE INTENT OF CONGRESS IN THAT STATUTE.

As originally articulated in 1832, the Indian canon redressed the fact that Indian negotiators were unfairly disadvantaged during treaty deliberations. One might posit that the Court's application of the Indian canon in *Alaska Pacific Fisheries* reflected implicit recognition that the Tsimshean Indians who benefited from the 1891 statute had no opportunity to communicate to Congress their interest in the withdrawal of Annette Island. For the first half of the twentieth century, few Native Americans actively participated in the legislation process through which statutes are enacted into law. But for at least the past twenty years or so that no longer has been the case.

Indian tribes have for some years operated an effective lobby on Capitol Hill. Composed of tribal representatives, attorneys, and professional lobbyists, during each session of Congress the Native American lobby competes, including by distributing campaign contributions,[1] on a level playing field against other lobbies to ensure that Native American interests are considered when Congress balances competing policy objectives during the drafting of legislation.

In *Circuit City Stores, Inc. v. Adams*, __ U.S. __, 121 S. Ct. 1302, 1311-1312 (2001), the Court recently observed:

> We ought not to attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal—even assuming the precise intent of the group can be determined, a point doubtful . . . as a general rule. . . . It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes.

---

[1] For example, according to the Center for Responsive Politics, seven of the top twenty gambling organizations that gave campaign contrib.-utions to the political parties and candidates during the 2000 election were Indian tribes that operate gambling casinos.

Rank	Organization	Amount
5	Mashantucket Pequot Tribe	$514,948
7	Seminole Tribe of Florida	350,000
14	Mississippi Band of Choctaw Indians	152,000
15	Eastern Band of Cherokee Indians	147,000
16	Morongo Band of Cahuilla Mission Indians	146,000
18	Pechanga Band of Luiseno Mission Indians	130,000
19	Viejas Tribal Government	107,300

See http://www.opensecrets.org/industries/contrib.asp?Ind=N07

The history of Native American participation in the legislative process that resulted in enactment of IGRA demonstrates that the continued invocation of the Indian canon to resolve all ambiguities in the texts of all statutes that affect Native American interests contradicts the admonition expressed in *Circuit City Stores* by aligning the Court with the policy aspirations of one lobby to the unfair detriment of all others.

In *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 461 U.S. 929 (1983), the Fifth Circuit held that the State of Florida had no jurisdiction to regulate gaming on Indian reservations. In response to *Seminole Tribe*, in 1983 Representative Udall, chairman of the House Committee on Interior and Insular Affairs, introduced H.R. 4566, a bill to regulate tribal gaming activities. Representative Udall explained that he neither "support[ed] or oppose[d] gambling activities in Indian country." He also explained that he "unders[tood] that there will be some Indian criticism and objection to this legislation." 129 Cong. Rec. 34184-85 (1983).In 1984 the House Committee on Interior and Insular Affairs held a hearing on H.R. 4566. Of nine witnesses, six represented tribes or Native American organizations, including the National Tribal Chairmen's Association and the National Congress of American Indians. Nine other tribes and Native American organizations submitted written statements. *Indian Gaming Control Act: Hearing on H.R. 4566 Before the House Committee on Interior and Insular Affairs*, 98th Cong. (1984).

At the beginning of the 99th Congress in 1985, Representative Udall reintroduced H.R. 4566 as H.R. 1920, and the Committee held two additional hearings on the bill. Of forty-five witnesses, thirty represented tribes. *Indian Gambling Control Act: Hearings on H.R. 1920 and H.R. 2404 Before the House Committee on Interior and Insular*

Affairs, 99th Cong. (1985). In 1986 the Committee reported an amendment in the nature of a substitute for the original text of H.R. 1920. H.R. Rep. No. 99-488 (1986). Rather than being uncritically pro-Indian, the substitute was drafted to balance a number of competing policy objectives. As the Committee's report on the substitute explains:

> Indian tribes initially opposed the legislation as an unwarranted intrusion upon tribal governmental sovereignty and an impairment of legal rights confirmed through extensive litigation in the Federal courts. Tribal support did develop on the legislation . . . . On the other side, opposition to the bill was advanced by some State governmental representatives and certain private interest groups because of their concern about the impact of Indian gaming activity not being subject to the regulatory and enforcement laws of the States . . . After full Committee hearings on the legislation and the receipt of extensive correspondence from concerned parties, the Committee concluded that many of the concerns expressed on both sides of the issue had merit and warranted consideration in the amendatory process. At the direction of the Chairman, an amendment in the nature of a substitute was developed for Committee mark-up purposes. The Substitute sought to strike a middle ground between the opposing viewpoints.

Id. at 23-24.

The House passed the Committee's substitute on a voice vote, 132 Cong. rec. 8179-88 (1986). In the Senate, the Select Committee on Indian Affairs held a hearing on a companion bill. Of fifty-five witnesses, forty-one represented tribes. The Committee then reported a substitute for H.R. 1920. S. Rep. No. 99-493 (1986). But the Senate took no action on the substitute because the bill was opposed by the U.S. Department of Justice, *see id.* at 22-27, as well as by two members of the Committee. *Id.* at 32.[2]

---

[2] The Select Committee later explained:

> Subsequent to reporting the bill, and in further response to administration and State concerns, additional changes were recommended by the Chairman of the Indian Affairs Committee. However, despite efforts to negotiate changes that were acceptable to all parties, the bill was not considered by the Senate prior to adjournment of the 99th Congress.

S. Rep. No. 100-446, at 4 (1988).

In the 100th Congress, in 1987, two Indian gaming bills were introduced in the Senate on which the Select Committee on Indian Affairs held a hearing. Of twenty-six witnesses, eleven represented tribes or Native American organizations, including the National Indian Gaming Association. The Committee then reported a new substitute which passed first the Senate and then the House on voice votes. *See* S. Rep. No. 100-446 (1988); 134 Cong. Rec. 24016-37, 25781 (1988).

The Select Committee's report explaining the substitute expressed the hope that district courts would resolve disputes regarding whether a State had negotiated in "good faith" with a tribe to develop a gaming compact by resolving factual uncertainties in favor of the tribe. S. Rep. No. 100-446, at 15 (1988).[3] Extrapolating from that snippet of legislative history, the petitioners assert that "it is inconceivable that Congress did not also intend for the Indian-law canons (sic) to apply to IGRA *in toto*." Brief on the Merits for Petitioners, at 14.

In any event, as the history of the 98th, 99th, and 100th Congresses' consideration of bills to regulate Indian gaming demonstrates, the 100th Congress intended no such result. The Select Committee's report acknowledges that during three Congresses "[t]he regulation of gaming activities on Indian lands ha[d] been the subject of much controversy."

---

[3] *Bath Iron Works Corp. v. Office of Workers' Compensation Programs*, 506 U.S. 153, 166 (1993) (noting that where statute is unambiguous, Court will "give no weight to a single reference by a single [legislator] during floor debate").

S. Rep. No. 100-446, at 5. The report also correctly observed that "it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, *to balance competing policy interests*." *Id.* at 3 (emphasis added). That point was conceded in a 1993 oversight hearing on IGRA, where the witness for the Minnesota Indian Gaming Association who, also had served as a member of the House staff involved in enactment of the IGRA stated: "The tribes very strongly opposed that, and the Senate in attempting to - and the Congress as a whole, *in attempting to strike a balance there*, agreed to a compacting procedure that the states proposed to give them some role in regulation." *Implementation of IGRA: Oversight Hearing before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources*, 103d Cong. 12, 33 (1993) (statement of F. Ducheneaux). None of the factual circumstances that informed the Court's articulation of the Indian canon in *Worcester v. Georgia* were applicable to the enactment of IGRA.

Since the enactment of IGRA, the interests associated with gaming have become some of the most powerful and significant political forces operating on the federal scene. For example, in hearings on IGRA reauthorization in recent years, numerous Indian tribes and organizations have participated in oversight hearings and proposed amendments to IGRA.[4]

---

[4] *Indian Gaming Regulatory Improvement Act of 1999: Hearing on S. 399 Before the Senate Committee on Indian Affairs*, 106th Cong. (1999) (two of three witnesses were Indians (including chairman of National Indian Gaming Association)); *Indian Gaming Regulatory Improvement Act of 1998: Hearing on S. 1870 Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (four of seven witnesses were Indian (including chairman of National Indian Gaming Association, president, National Congress of American Indians)); *Indian Gaming Regulatory Act Amendments of 1997: Hearing on S. 1077 Before Senate Committee on Indian Affairs*, 105th Cong. (1997) (seven of ten witnesses were Indian (including chairman of National Indian Gaming Commission, chairman of National Indian Gaming Association, and first vice-president, National Congress of American Indians)). A partial list of hearings before Congress on IGRA, including the Indian participation, is as follows: *Gaming Regulatory Act Amendments of 1995: Hearing on S. 487 Before the Senate Comm. on Indian Affairs*, 104th Cong. (1995) (seven of 12 witnesses were Indians); *Implementation of Indian Gaming Regulatory Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources*, Parts V and VI, 103d Cong. (1993 and 1994) (11 of 34 witnesses were Indian (including executive director of the National Indian Gaming Association); *Indian Gaming Regulatory Act: Hearing Before the Senate Comm. on Indian Affairs*, Part II, 103d Cong. (1994) (11 of 15 witnesses were Indian (including chairman of Minnesota Indian Gaming Association, president of NCAI, and chairman of National Indian Gaming Association)); *Indian Gaming Regulatory Act Amendments: Hearing on S. 2230 Before the Senate Comm. on Indian Affairs*, Parts I and II, 103d Cong. (1994) (19 of 51 witnesses were Indian (including president of NCAI, chairman of National Indian Gaming Association, and Frank Ducheneaux)); *Implementation of Indian Gaming Regulatory Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources*, Parts I through IV, 103d Cong. (1993) (33 of 67 witnesses were Indian (including Kevin Gover, representing Pueblo of Tesuque, New Mexico, the president of NCAI, the chairman of the National Indian Gaming Association)); *Implementation of Indian Gaming Regulatory Act: Oversight Hearing on Status of the Activities Undertaken to Implement the Gaming Regulatory Act Before the Senate Select Comm. on Indian Affairs*, Part I, II and III, 102d Cong. (1992) (28 of 66 witnesses were Indian (including chairman and vice chairman of the National Indian Gaming Association)); *Implementation and Enforcement of the Indian Gaming Regulatory Act, Public Law 100-497: Oversight Hearings on Implementation and Enforcement of the Indian Gaming Regulatory Act, Public Law 100-497 Before the House Comm. on Interior and Insular Affairs*, 102d Cong. (1992) (18 of 27 witnesses were Indian (including chairman of the National Indian Gaming Association)).

It would truly be a perverse twist in logic to construe a law such as IGRA, whose evolution is now influenced by extraordinarily well-financed, ably-represented tribes and Indian organizations, under the same theory that was developed by this Court to protect disadvantaged and under-represented tribes who entered into treaties with the United States. Today, in laws such as IGRA, the playing field has been leveled, and the canon should find no application.

CONCLUSION

"[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation" *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992). As the history of the enactment of IGRA demonstrates, any presumption that Congress always intends the ambiguity in modern legislation affecting Native American interests to be resolved in favor of the Indians bears no factual relationship to the reality of the legislative process.

For these reasons, *amici* Ledyard, North Stonington, and Preston respectfully urge the Court to clarify that the Indian canon should not be applied to discern the intent of Congress in passing IGRA.

Respectfully submitted,

BENJAMIN S. SHARP
Counsel of Record
GUY R. MARTIN
DONALD C. BAUR
KELLY A. CAMERON
PERKINS COIE LLP
607 Fourteenth Street, N.W.
Suite 800
Washington, D.C. 20005-2011
(202)-628-6600

Counsel for the Towns of Ledyard, North Stonington, and Preston,Connecticut

DONALD C. MITCHELL
1335 F Street
Anchorage, AK 99501
(907)-276-1681

June 21, 2001